



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Coopers Construction, Incorporated

File: B-260364; B-260364.2

Date: May 30, 1995

Lawrence J. Sklute, Esq., for the protester.
Vaughn E. Hill, Esq., and Charles D. Raymond, Esq.,
Department of Labor, for the agency.
Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Where amendment specifies new, restrictive work conditions and requires bidders to provide alternate bid addressing performance under those conditions, amendment is material and bid which failed to acknowledge amendment was properly rejected as nonresponsive.
2. Protester's nonreceipt of solicitation amendment provides no basis to challenge rejection of bid for failure to acknowledge amendment where record shows that reasonable procedures for disseminating bid documents were followed, and there is no evidence that protester was deliberately excluded.

DECISION

Coopers Construction, Incorporated protests the rejection of its bid for failure to acknowledge an amendment to invitation for bids (IFB) No. 95-DAA-02-JC, issued by the Department of Labor, for heating and air conditioning work at the Little Rock (Arkansas) Job Corps Center. Coopers argues that the agency improperly rejected its bid because the amendment was not material and that the agency did not use reasonable methods to ensure timely delivery of the amendment to all prospective bidders.

We deny the protest.

The IFB, issued October 31, 1994, sought lump-sum bids to replace 140 heat pump units in the Center's living quarters and the heating, air conditioning, ventilation system, and

kitchen vent hood in the kitchen.¹ The specifications, drawings, and work statement were prepared and sent to prospective bidders by an architect-engineer (A&E) firm under a contract with Labor.

The original statement of work required the contractor to "cooperate fully" with the Center during construction operations to minimize conflicts and facilitate the Center's usage. The contractor was not to interfere with any phase of the Center's operations and was to make changes/alterations to the existing facilities without disrupting continuous use by the Center. This aspect of the work statement was the subject of amendment No. 2 at issue here, which requested an alternate bid to allow the agency, at its option, to repaint the existing kitchen ceiling grid using its own personnel. The amendment also requested an alternate bid which would allow the agency to keep the kitchen open for the preparation of meals from 5 a.m. to 7 p.m., restricting the contractor's access to the kitchen from 7 p.m. to 5 a.m. The purpose of the alternate bid was to determine the cost effectiveness of closing the kitchen during construction which would mitigate construction costs, but at the expense of catering student meals, which was calculated to be \$86,250 for the estimated 5-week construction period. The amendment specifically warned that failure to acknowledge receipt would render a bid nonresponsive. The IFB already provided that failure to bid on all items would disqualify a bid.

Three bids, including those of Coopers and Scott Service Company, Inc., were submitted by the December 8 bid opening date. Coopers submitted the lowest bid for the basic work (\$219,000), but neither acknowledged amendment No. 2 nor included the alternate bid required by the amendment. Scott, which submitted both a basic bid (\$219,530) and an alternate bid (\$7,500), was the second low bidder. The agency determined to award the contract on the basis of the basic and alternate bids combined. Accordingly, it rejected Coopers's bid as nonresponsive for failure to acknowledge amendment No. 2 and for failing to submit an alternate bid. Upon learning of the agency's intent to award to Scott, Coopers filed a protest with the agency. When the agency denied that protest, Coopers filed its protests with our Office.

¹The Center regularly has some 175 disadvantaged youths in residence to learn job skills. The Center provides living and dining facilities for the students during their training.

As a threshold issue, we will consider whether amendment No. 2 was properly issued. Coopers alleges that the amendment is void because the A&E firm lacked the authority to issue it. Coopers's allegation is without merit. The A&E firm prepared the solicitation pursuant to a contract awarded it by Labor, which required the firm to prepare specifications and drawings, assemble the solicitation, and distribute it to prospective bidders. In addition, the contract provided that all clarifications, directions, or comments regarding the drawings or specifications would be issued as amendments to the solicitation. The A&E firm was responsible for issuing any amendments to registered planholders (here, prospective bidders like Coopers), and amendment No. 2 was issued in accordance with these requirements. When the Center expressed concern about the likely extended closing of its kitchen for replacement of the kitchen vent hood and other equipment, the agency's contracting officer's representative met with the A&E firm and approved its creation and issuance of the amendment which specified the alternate bid requirement. Since the A&E firm was authorized and directed by the agency to issue the amendment, there is no basis to challenge the amendment's validity.

The next issue is whether the amendment is material. A bidder's failure to acknowledge a material amendment to an IFB renders the bid nonresponsive, since absent such an acknowledgment, the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. Air Quality Experts, Inc., B-256444, June 15, 1994, 94-1 CPD ¶ 374. On the other hand, a bidder's failure to acknowledge an amendment that is not material is waivable as a minor informality. Federal Acquisition Regulation (FAR) § 14.405; DeRalco, Inc., 68 Comp. Gen. 349 (1989), 89-1 CPD ¶ 327. An amendment is material if it would have more than a trivial impact on price, quantity, quality, or delivery of the item bid upon, or would have an impact on the relative standing of the bidders. Id.; FAR § 14.405(d)(2). No precise rule exists to determine whether a change required by an amendment is more than negligible; rather, that determination is based on the facts of each case. Id.

Coopers argues that the amendment was not material because the solicitation already required the awardee to cooperate with the agency in performing the work and to obtain approval from the contracting officer for its schedule of work. We disagree. The amendment did not merely restate the existing requirement not to unreasonably obstruct or interfere with the Center's operation; rather, the amendment added significant new conditions. In addition to providing for the contractor's cooperation while the agency repainted the Center's ceiling, the amendment set a specific limit of

5 weeks from shut down of the existing vent hood and kitchen air conditioning systems to the time of completion and return of the kitchen to the owner. The amendment also provided for submission of an alternate bid covering an option which would restrict the contractor to work on the kitchen only during the hours of 7 p.m. to 5 a.m., which would allow only 2 weeks for the kitchen vent hood to be out of service, and required installation of a temporary exhaust fan. This amendment changed the original requirement for coordination to resolve unreasonable obstructions to performing the work to a fixed limitation on hours for a particular aspect of the contract. Since the amendment was likely to increase the bidders' prices, and had more than a trivial effect on contract performance, it clearly was material and therefore not waivable. DeRalco, Inc., supra; FAR § 14.405(d)(2). Thus, Coopers's failure to acknowledge the amendment and submit an alternate bid rendered its bid nonresponsive.

Coopers next argues that the agency used unreasonable procedures for disseminating the solicitation amendments. Coopers claims that sending its copy of the amendment by regular mail, when it provided the amendment by messenger to local bidders, was unreasonable since it would have provided it too little time to respond to the amendment.²

A prospective bidder bears the risk of not receiving an IFB amendment unless there is evidence establishing that the agency failed to comply with the regulatory requirements for notice and distribution of amendments. Monterey Advanced Imaging Ctr., B-253152, Aug. 24, 1993, 93-2 CPD ¶ 118. FAR § 14.208 provides that amendments shall be sent before the time of bid opening to everyone to whom invitations have been furnished. No award shall be made unless such amendments have been issued in sufficient time to permit all prospective bidders to consider such information in submitting or modifying their bids. Id.

There is no evidence that Labor failed, either deliberately or otherwise, to comply with the regulatory requirements for notice and distribution of the IFB and amendments. According to the A&E firm, its project manager develops a plan distribution list which includes the names and

²Coopers also alleges that it called the A&E firm on December 5 or 6 and was told by an unidentified person that no amendments had been issued. The A&E firm denies that any personnel made such a representation to the protester. In any event, oral advice by representatives of the contracting officer are not binding on the government and a bidder relies on such advice at its own risk. See Cuernilargo Elec. Supply, B-240249, Nov. 2, 1990, 91-1 CPD ¶ 68.

addresses of all parties to receive bid documents including bidders, like Coopers, which express an interest in the solicitation. When the documents are ready for issue, the A&E firm sends them to a local blueprint shop for reproduction and delivery/mailing to each party named on the distribution list. When the party is local, distribution is by messenger; when the party is out of town, the IFB is sent via U.S. Mail. The A&E firm follows the same procedures with regard to amendments.

Here, the agency issued amendment No. 2 through the A&E firm on November 23, approximately 2 weeks before bid opening. The A&E firm delivered it to the blueprint shop, which states that it duplicated and distributed it the same day to all parties on the distribution list, including Coopers. The blueprint shop did not receive any amendment packages which were returned as undeliverable. We find nothing unreasonable or violative of applicable regulations in these procedures. While the amendment was delivered to local firms by messenger, there is nothing inherently unreasonable in using the U.S. Mail to send it to the protester which requested bid documents be sent to it in the state of Washington. Further, it was reasonable for the agency to infer that 2 weeks was sufficient time for the protester to receive and respond to this amendment.


Coopers complains that 2 weeks was insufficient because it took 14 days for the protester to receive the original IFB package and the agency was ostensibly aware of that delay.³ We believe the delay and responsibility for it lies with Coopers and not the agency. The time required for Coopers to receive mail was not due to any delay caused by the agency, but to Coopers's arrangement for obtaining the bid documents. While Coopers submitted its bid from its Gilbert, Arizona office, it specifically requested that the IFB be sent to its Bremerton, Washington address. It is more likely that the apparent misrouting of the amendment package was due to this arrangement rather than to any unreasonable action by the agency.

Coopers also protests the agency's failure to provide it with a copy of the minutes of the pre-bid walk-through since those in attendance were told that opportunities "can be available" for additional site visits by contractors. Coopers, which chose not to attend the walk-through, claims that bidders making additional visits would be able to more accurately estimate the project's difficulty and cost.

³Coopers alleges that the agency should have reduced the time for mailing based on the difference between the date of mailing and the date of the check Coopers wrote for the IFB package.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1988), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a) (1995). Where the protester's nonresponsiveness is unrelated to the issue raised, the protester is not an interested party. See FLIR Sys., Inc., B-255083, Jan. 24, 1994, 94-1 CPD ¶ 36. Coopers's bid was nonresponsive because it failed to acknowledge an amendment issued after the walk-through, and not due to any information contained in the walk-through minutes. Thus, Coopers is not an interested party to raise this issue.⁴

The protest is denied.


For Robert P. Murphy
General Counsel

⁴We also note that Scott, the only other responsive bidder, also did not attend the walk-through. The only bidder which made more than one site visit had its bid rejected as nonresponsive.